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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 171

STATE OF MARYLAND, Ex Relatione HAROLD H. CHANNELL,

Petitioner,

vs.

GEORGE J. MURPHY, Captain of Detectives, Baltimore City Police Department, Baltimore, Maryland

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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GEORGE J. MURPHY, CAPTAIN OF DETECTIVES, BALTIMORE CITY POLICE DEPARTMENT, BALTIMORE, MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Harold H. Channell,[1] pursuant to the Rules of this Honorable Court,[2] prays that writ of Certiorari issue to review the final decision of the Maryland Court of last resort, R. 107 in disallowing by Opinion an application for appeal from the decision of the Maryland lower Court, R. 6 which had refused to issue a writ of *habeas corpus* directed to George J. Murphy, Captain of Detectives, Baltimore City Police Department, Baltimore, Maryland,[3] to release Channell from the custody of Murphy.

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[1] Hereinafter called "Channell".

[2] Rule 38, as amended, Revised Rules of the Supreme Court of the United States.

[3] Hereinafter called "Murphy".

I. Matter Involved

A. Procedure

The procedure below was as follows: On January 14, 1953, Channell was arrested by agents of Murphy, on the authority of a telegram from the Los Angeles, California Police Department, requesting Murphy to apprehend Channell and hold him pending the arrival of a warrant.

Upon being docketed on January 14, 1953 in the Central Police Court (Baltimore City Magistrate Court) Channell refused to waive extradition and demanded a hearing before the Governor of the Asylum State, as is permitted by Maryland law.[4]

On January 21, 1953, Channell was indicted in the County of Los Angeles, State of California for the crimes of burglary allegedly committed on November 30, 1952 (Sunday) and December 1, 1952 (Monday).

A warrant, dated January 21, 1953, was thereupon issued by a Los Angeles Judge, commanding the appropriate police authorities of the Demanding State to arrest Channell.[5]

The District Attorney of said County, in the Demanding State, then furnished a certified copy thereof to the Governor of the Demanding State as well as certain affidavits, that Channell was a fugitive from the justice of the Demanding State and had taken refuge in the State of Maryland.

He applied to the Governor of the Demanding State for a requisition upon the Governor of the Asylum State for the arrest and rendition of Channell and his delivery to the agents of the Demanding State [6] and the Governor of the Demanding State duly issued said requisition.

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[4] Md. Anno. Code, Art. 41, Secs. 15-42 (Flack's Ed. 1951).

[5] O. E. 17 (References to "Official Exhibits" shall be hereafter denoted by "OE.; references to "Record" shall be hereafter denoted by "R".

[6] O.E. 5-7.

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Hearings were held on February 26th and 27th, 1953, before an Assistant Attorney General of Maryland, one Joseph Buscher, Esq., but the Governor of the Asylum State issued a warrant of rendition on March 5, 1953, for Channell to be returned to the agents of the Demanding State. O. E. 19. Channell then petitioned the lower Maryland Court for a writ of *habeas corpus*, R. 3.[7] He was given a hearing before His Honor, Judge Michael J. Manley, Baltimore City Court, the final result of which was that the writ was refused and Channell was remanded to the custody of Murphy for rendition to the agents of the Demanding State, R. —.

Under the Maryland law,[8] Channell then petitioned, R. 1, the Maryland Court of last resort for leave to prosecute an appeal, but said Court denied said application in a written opinion filed on May 13, 1953, R. 107.

It is from the aforesaid refusal that instant petition is filed.

B—Facts

Channell does not seek inquiry into his guilt or innocence "except as it may be involved in identifying (him) as the person charged with the crime." Md. Anno. Code, Art. 42, Sec. 33, *supra*. His contention is that he was not in the Demanding State at the time of the commission of the alleged crime and, as will be later developed (pp. 4-12 herein), he urges that the proof before the Maryland lower Court to the effect that he was present in the Asylum State on the crucial dates (November 30, 1952 and December 1, 1952) was truly overwhelming.

The following is a *precis* of the testimony before the Maryland lower Court.

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[7] Pursuant to the provisions of Md. Anno. Code, Art. 41, Sec. 24, *supra*.

[8] Md. Anno. Code, Art. 42, Sec. 6, *supra*, and pursuant to Rule 49 of the Rules of the Court of Appeals of Maryland.

Arthur V. Wise, President of Warner and Company, of Baltimore, Maryland and with that Company for 49 years, testified that he knew Channell for 25 or 30 years; that he saw him in Warner's at 9:30 o'clock A.M. on November 29, 1952; that Channell gave him a hat to be renovated and he gave Channell a receipt from Warner's records which was returned when Channel later called for the hat on February 5, 1953. This witness identified this receipt. He also produced Warner's record of the transaction. The receipts show the date to be November 29th, 1952 and witness distinctly recalled that the hat was brought in by Channell, and that he (witness) wrote Channell's name on the receipt. Channell came into the store occasionally and Mr. Wise did not usually wait on him. That he waited on him on the occasion in question, because it was so early in the morning. (R. 13-14).

Robert Murphy, President of American Baseball Guild, American Football Guild and during off seasons, employed at Union Food Plant, testified that he had known Channell for about six months. He is an ardent football fan of Notre Dame, which played against the University of South California on the last Saturday in November, 1952 (the 29th). He recollected discussing this game with Channell in the bar of the Park Plaza Hotel in Baltimore on this Saturday. He said that Channell talked about a horse called "Price Dare," which ran that day at Bowie Race Track. His talk with Channell was between 4:30 and 5:00 o'clock P.M., because, as he said, they were watching the last period of the football game over television. He saw Channell the next day, Sunday, November 30th, at approximately 11:30 A.M. or 12:00 o'clock Noon, at the same place and he named several other men who were there. He also saw Channell the next day, December 1, 1952 in the Club Bar of the Park Plaza Hotel. Mr. Murphy had watched football games on other Saturdays with Channell, (R. 18).

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Edmund J. Fick, roofing contractor and partner in the business of Fick and Company, testified that he was acquainted with Channell and saw him on November 29th, which was the same day that he (Fick) had attended an oyster roast held by the Associated Building Contractors at the Liberty Gun Club on Liberty Avenue, Baltimore, Maryland. He arrived at the Park Plaza Bar about 5:00 o'clock P.M. and watched the Notre Dame-Southern California game, which was shown on television after the Army-Navy game, played the same day. The next morning, Sunday, November 30, 1952, he went to the 11:30 o'clock A.M. Mass at St. Ignatius Church, Calvert and Madison Streets, Baltimore, Maryland; left there around 12:30 o'clock P.M. to get a milk punch at the Park Plaza; and there he met Channell and several other men all named by the prior witness. That he usually stopped in the Park Plaza bar after lunch and that he remembered the dates because of the fact that he was interested in the Notre Dame-Southern California football game (R. 18).

George Ross testified that he is in the advertising business, his office being in the Park Plaza Hotel. He knew Channell for about 5 or 6 years. He seldom works on Sundays, but he remembered that it was necessary for him to work on the Sunday following Thanksgiving (November 30th) in order to write copy for a certain radio broadcast. That he had combination breakfast and lunch about Noon on that day and Channell sat down with others and had some coffee with him. He remembered particularly mentioning his dissatisfaction in having to come in on that particular Sunday. He recently moved to the country and had planned to spend his weekends there, (R. 21).

Armando Porter, driver of taxicab #599, belonging to New City Cab Company showed a manifest dated November 30th, which he said was filled in by him on that day. At 4:16 o'clock P.M. the manifest noted that he picked up

a passenger, whom he identified as Channell, at North Avenue and Charles Street, and drove him to Madison and Cathedral Streets, Baltimore, Maryland. The reason he remembered him is because at the end of the day, his employer asked him whether he had found a doll in his cab, claimed to have been left by a passenger. The next morning on December 1, 1952, the man who complained, identified by witness as Channell, called at the Cab Company and asked witness whether he had found the doll. That no other person had ever complained to him about losing anything—this was the only time this had happened. That he had not found the doll. That he had never seen Channell before in his entire life and was not a friend of Channell. (R. 30).

Michael A. Vittello testified that he was the owner of the New City Taxicab Company and employer of Armando Porter. He testified that he saw Channell on December 1st, 1952. That on November 30, 1952, a man who said he was Channell had complained over the telephone about losing a doll in a taxicab, which taxicab had taken him, on November 30th, from North and Charles Street to Cathedral and Madison Streets, Baltimore, Maryland. He pointed out Channell in the court room, as the man who came in between 9:00 o'clock A.M. and 9:30 o'clock A.M. on December 1st, 1952 and complained about the loss of the doll. He (Vittello) was positive concerning the dates because the manifest read November 30, 1952. He had never seen Channell before nor was he a friend of Channell. (R. 23).

Mary Askew, a colored maid at the Knights of Columbus for about six years, testified that she knew Channell, who occupied room No. 612 in the Knights of Columbus Building, Baltimore, Maryland, since she first went to work on the sixth floor. That he had always lived in the same room. That she would see him nearly every day. That she remembered seeing Channell right after Thanksgiving 1952, be-

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cause she is the maid on that floor and she makes his bed. That she launders his shirts and he pays her $8.00 per month on the first day of the month, except when the first falls on a Sunday, on which day she does not work, and in this event, he always paid her on the Monday following. That if the first fell on a weekday, he always paid her on that day. That he paid her on December 1, 1952, which was a Monday. That "it is hard to remember every day, but I do know he paid me the first of the month unless it came on Sunday, because I don't work on Sunday." That she saw him in the Knights of Columbus hotel during the week prior to December 1, 1952, around Thanksgiving; that his room was occupied; that he is hardly ever away; that he has never gone more than two or three days, but that she remembers he was away for a few days in September, 1952. (R. 38).

The next witness was Channell's son, John Channell of Easton, Maryland, a former State Trooper, First Class, for ten years. He testified that he had been in the roofing business since November 14, 1952 and prior to that, an auto salesman in Easton for a short period. He saw his Father on the evening of November 30, 1952 at the Knights of Columbus Building. He recalled the date because his former employer, Jerry Hollywell, was injured on Route 50, six miles south of Easton on November 25th. Witness called Barracks No. 101 at Easton and told them of the accident. On Thanksgiving Day, the 27th of November, witness was home in Easton, and on the following Sunday, the 30th, he saw his Father at the Knights of Columbus Building; that he talked about Hollywell's accident and his Father mentioned a baby doll for witness's eldest daughter, which witness took home. That he left his Father about 10:00 o'clock P.M. That he often visited his Father on Sunday, but not every Sunday. (R. 33).

Newman Tucker testified that he is Sales Manager for

the Hollywood-Roosevelt Hotel in Hollywood, California. He identified two guest registration cards from that Hotel. Both were signed by one Robert W. Kirk. One showed that Kirk arrived on November 5, 1952 and departed on November 8, 1952; the other showed that Kirk arrived on November 27, 1952 and departed on December 2, 1952. (R. 151).

George G. Messnick testified that he is a special agent for the Federal Bureau of Investigation and has been employed by it for sixteen years. His work "includes identification of handwriting, hand printing, typewriter and other related matters." He received a Degree of Bachelor of Science from the Rensselaer Polytechnic Institute and attended many classes and lectures in the F.B.I. laboratory, had studied many books by well known authorities, and worked on the job under the supervision of a number of experts in the F. B. I. He had qualified and testified throughout the United States, Canada and the Virgin Islands. There had been opposing expert testimony in only two of those cases and in both, the opposing experts had not testified contrary to the witness' opinion, but rather had reached no conclusions. The witness had compared the signature of "Robert W. Kirk" on the registration cards of the Hollywood-Roosevelt Hotel with handwriting of Channell from the hotel register of the Knights of Columbus, and from a letter which Channell had written to Federal Judge W. Calvin Chesnut. He produced enlargements of these specimens and discussed in detail the comparison. He was then asked his conclusion, and said, "It is my conclusion that the names and addresses appearing on the two Hollywood-Roosevelt cards were prepared by the writer of the hotel registry which is marked for identification as 'C' (the Knights of Columbus registry), and the writer of the letter to Judge Chesnut . . ." The

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witness had appeared in Court in less than one per cent. of the cases he had handled. The number was so small because in most cases he reached a conclusion of non-identity, viz. the specimen did not compare with the questioned writing. (R. 175)

Dr. J. Newton Baker testified as a handwriting expert on behalf of Channell. The witness held a doctor's degree and was a lawyer, but did not practice law. He had qualified as a handwriting expert in the Courts of practically every State along the Eastern Seaboard. He had been "frequently appointed by the Judges to make examinations and reports." Under examination by the Assistant State's Attorney, he testified that he had testified in approximately 100 cases, and that he had always qualified. He had gone to art school in 1894 and worked for the United States Government Bureau of Internal Revenue and the United States Coast and Geodetic Survey. The witness then testified that he compared the specimens of handwriting of "Kirk" with that of Channell. He concluded that the signatures on the registration cards of the Hollywood-Roosevelt Hotel were "forgeries." By this he meant that they did not bear Kirk's signature, nor were they written by Channell. He was definitely of the opinion that Channell did not sign the registration cards of the Hollywood-Roosevelt Hotel. (R. 232).

The State introduced the testimony of Mrs. Sascha Newman to establish that Channell was in California on the crucial dates. She resided in California near Los Angeles and had arrived from there on the afternoon before the trial. She was at home in Pacific Palisades in California on December 1, 1952. She was in her bedroom when she glanced out the window and saw a 1952 black Cadillac parked at the end of the driveway. She wondered why someone would park there, rather than directly in front

of the house. It was "a nasty day and raining." She thought she saw a shadow or "something peculiar" in her dressing room, which was just beyond the bedroom. The time was 1:20 P. M. She entered the dressing room and noticed that all of the drawers and closets had been opened. She saw "the shadow of a man bending over the middle drawer of her "dressing table." She asked the person who he was and what he was doing. The man stood up and took two or three steps toward her. He told her that he was from the telephone company. She told him that nothing was wrong with her telephone. She was frightened and wanted to leave the room "very fast." He asked her whether she had an extension in the room. She answered that she did, and that if he would wait a moment she would show him where it was. She left the room, went rapidly to her laundry room to get her maid, and when she returned, the man was gone.

When the man took the steps toward her, he was not more than four or five feet from her. She had never seen the man again until she entered the Court room that morning. That this man was in her sight for only a few seconds. She was asked to identify the man and pointed out Channell. After this man left her bedroom she phoned the Los Angeles Police Department. They came and questioned her about fifteen minutes after she placed the call.

On cross-examination, she testified that her husband is Vice-President of Samuel Goldwyn Studios and that she had lived in Los Angeles for eleven years. At the time of the incident in question, the lights were not on in any of the rooms of her home, although she said that they were not needed. She had seen a man whom she identified as Channell shortly after she entered the Court room, but he had not been pointed out to her. She recognized him because she said, "I will never forget that face as long as

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I live." The police officer from California visited her at her hotel suite on the night before the trial, but he did not "have any pictures" with him.

The man who came to her house did not wear gloves. When the police arrived, she told them that the man had had his hands on the various open drawers. The police did not take fingerprints. She asked them about it, and they told her that her own fingerprints and probably the maid's had been all over the things which the man had touched. Over a period of several weeks, the police visited her and asked her to identify the man from pictures. She saw approximately 100 pictures. About two or three weeks after the incident, she picked out a picture which she said was that of Channell. She knew that the Cadillac which she observed at the end of the driveway was a 1952 model, because it had a gold "V" on the back of the trunk. She saw the back and the entire one side of the automobile. She was approximately 20 feet from the automobile. Although it was raining, it was not a "teeming rain," so that she could easily see the golden "V". She was very familiar with Cadillacs and knew that the 1952 model could be distinguished only by the golden "V". She did not look at the license plate so that she could tell whether it was a California license. She wore glasses only when she did fine sewing. She visited her doctor for an eye examination within the last four weeks, but she said she could see "perfectly." She had not gone to the doctor because of eye trouble, but because she had pains in her temples, which she thought may have originated in her eyes. She was asked whether it was dark on the day in question and answered, "The sun was not out, but it wasn't real dark." It was not that she could not see the license plate, but rather that she did not "notice" it (R. 64).

Although the lower Court refused to issue the writ of

habeas corpus, he made the following comments in his opinion:

> "I frankly state that if Mrs. Newman had not come here from California, I would not hesitate to say that the testimony offered on behalf of Channell was overwhelming and I certainly would release him; that is to say, I would accept that testimony as opposed to the handwriting experts." R. 8.

He also stated that:

> "It is unfortunate that I do not have the right[9] because I have certain ideas of my own which it is unnecessary for me to state regarding the effect that should be given that (Channell's testimony). The witnesses here who have testified knew Channell, they were familiar with him, they were acquainted with him; and they would have a better opportunity to recognize him than some person who only saw him on one occasion." R. 8.

As to his impression of the witnesses produced by Channell, he had this to say:

> "The case is unusual in that a number of witnesses have testified for Mr. Channell—some of the witnesses I am acquainted with and have great respect for their integrity. They have come here and they have testified to having seen Mr. Channell on November 29th, November 30th, and one witness I think, Mr. Murphy, who saw him on December 1st. Then we have Mr. Vittello, the owner of the taxicab and Porter, the driver of the taxicab also testified. There is also the testimony of Mary Askew, the maid at the Knights of Columbus." R. 7.

II. Basis of Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1257 (3), Title 28, U.S.C., Sec. 2101 (3) and

[9] The right to pass on the credibility of the witness before him.

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pursuant to the United States Constitution, Art. IV, Sec. 2[10] and Rev. Stat. Sec. 5278 (1948), 18 U.S.C.A. Sec. 3182 (1951).[11]

It was the duty of the Maryland lower Court of the Maryland Court of last resort "to administer the law prescribed by the Constitution and Statute of the United States, as construed by this Court. (Citing cases.) *South Carolina* v. *Bailey*, 289, U.S. 412, 420, 53 S. Ct. 667, 669, 77 L. Ed. 1292 (1933).

III. Questions Presented

In the Maryland lower Court, eight witnesses who produced documentary evidence testified that Channell was in the Asylum State on the crucial dates, i.e., November 30, 1952 (Sunday) and December 1, 1952 (Monday) and only one witness testified that he was in the Demanding State on December 1, 1952. In addition, there was a conflict of expert handwriting testimony. The lower Court rested its decision on the one witness produced by Murphy and, for all intents and purposes disregarded the handwriting ex-

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[10] "A person charged in any State with . . . Felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled; be delivered up, to be removed to the State having jurisdiction of the crime. . . ."

[11] "Whenever the executive authority of any State or territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of his arrest, the prisoner may be discharged."

perts. See p. 12 herein. Therefore, the crucial question is whether the Maryland Court of last resort erred in refusing to allow Channell to appeal from the decision of the Maryland lower Court, which had decided that the evidence that Channell was not in the Demanding State at the time of the commission of the alleged crimes was not conclusive or overwhelming.

A corollary question is whether the Maryland lower Court did not misconstrue the law as announced by this Court in holding that he had no right to pass on the credibility of the Channell witnesses, there being one credible witness produced by Murphy (the State).

IV. Reasons for Granting the Writ

It is submitted that the Maryland lower Court fatally erred in remanding Channell to the agents of Murphy and that the Maryland Court of Appeals fatally erred in refusing to allow Channell to appeal from the decision of the lower Court.[11a] In each instance, it is urged that the two decisions, as aforesaid, violated the law, as enunciated by both this Court and the Maryland Court of Appeals.

The Maryland law, which follows the law as enunciated by this Court, is that in order to permit discharge in an extradition case, the evidence of presence in the Asylum State at the time of the commission of the alleged crimes must be "overwhelming" or "clear and satisfactory" or "beyond reasonable doubt." *Illinois ex rel McNichols* v. *Pease*, 207 U. S. 100, 28 S. Ct. 58, 52 L. Ed. 121 (1907); *Munsey* v. *Clough*, 196 U. S. 364, 25 S. Ct. 28d, 491 L. Ed. 515 (1905); *South Carolina* v. *Bailey*, 289 U. S. 412, 53 S. Ct. 667, 77 L. Ed. 1292 (1933); *Audler* v. *Kriss*, — Md. —, 79 A. 2d 39 (1951); *Zack* v. *Kriss*, — Md. , 74 A. 2d 25 (1950).

[11a] In Maryland, there is no *absolute* right of appeal from the decision of a lower Court in a *habeas corpus* case, Md. Anno. Code, Art. 42, Sec. 6, *supra*.

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In addition to the cases, dictionary definitions of the words "overwhelming," "clear," and "satisfactory" may throw some additional light upon the meaning to be ascribed to these words.

"Overwhelming" as defined by Webster, New International Dictionary, 2d Ed. (1951) means to "overturn, upset, or overthrow." The Oxford English Dictionary Vol. VII (1933) states "submerges completely; so powerful as to overcome utterly by strength of numbers, influence, etc." Funk and Wagnalls' New Standard Dictionary of the English Language, Vol. 2 (1949) defines it as "crushing with force, weight or numbers, irresistable, overpowering. . . ." Collier, The New Century Dictionary, Vol. 2 (1927) says ". . . something so great as to render resistance or opposition useless (as an overwhelming majority. . . ."

"Clear" according to Webster, supra, means ". . . Distinct, readily perceptible, unconfused, plain, easy to understand, lucid. . . ." "Having a distinct or unconfused opinion, free from doubt, certain, positive, sure." Oxford, *supra*, says that it means "manifest to the mind or judgment, evident, plain. . . . Of a case at law. Of which the solution is evident. . . . Having a vivid or distinct impression or opinion, subjectively free from doubt, certain, convinced, confident, positive, determined. Funk and Wagnalls, *supra*, says it means "To free from doubt or ambiguity, relieve from ambiguity, relieve of obscurity of mental impression." Colliers, *supra*, defines it as ". . . evident, plain, free from confusion, uncertainty or doubt."

"Satisfactory" according to Webster, *supra*, means ". . . yielding content, as adequate for the purpose, offering adequate treatment or fullness of detail; of a kind to meet all requirements or expectations, explaining fully. . . ." Oxford, *supra*, says it means ". . . Sufficient for the needs of a case, adequate, . . . convincing." Funk and Wagnall's, *supra*, defines it as ". . . answering fully all desires

and requirements; sufficient . . . .'' Colliers, *supra,* says ''Affording satisfaction, fulfilling all demands or requirements; satisfying, adequate; often, convincing, as an argument or explanation. . . .''

It is conceded that Channell is faced with a ''presumption raised by the extradition proceeding that he is a fugitive from justice.'' *Audler* v. *Kriss, supra.* However, there has been no case reported in Maryland containing facts similar to those as are involved in instant case; and therefore, the various Maryland decisions, while enunciating proper tests on the facts involved therein, do not control instant facts.

For example, in the *Audler* case, *supra,* the petitioner produced *three* witnesses to testify that he was in the Asylum State (at the time of the alleged crime) and *three* witnesses testified that he was in the Demanding State at such time. Therefore, the Maryland Court of Appeals properly held that where the evidence was ''merely contradictory,'' that the accused should not be discharged.

It is obvious that in the *Audler* case, the evidence as to presence in the Demanding State was ''merely contradictory.'' In instant case, Murphy produced only *one* witness as compared with the *eight* produced by Channell. The credibility of Channell's witnesses will be later discussed, but the important point is that the Maryland Court was faced, in the *Audler* case, with evidence so essentially contradictory, that it quite reasonably stated that it would not, under such circumstances, pass upon the credibility of the six evenly conflicting witnesses and therefore the *Audler* petitioner was not discharged.

The Maryland Court of Appeals, however, did *not* state, nor *mean* to state, that there would *never* be a case in which credibility could not be the subject of judicial inquiry. It very wisely left open such question because it was easily

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foreseeable that there might be evidence in future cases, which was not "merely contradictory."

Nevertheless, the Maryland lower Court misapplied the rule in the *Audler* case. He applied a test based upon a three-three *split* to a case based upon an eight-one line up. He mistakenly held that since the Maryland Court of Appeals had announced the existence of a presumption of flight from justice, that in *all* cases there is no right to pass upon the credibility of *any* witnesses. He stated:

> "I am of the opinion that I do not have the right in a *habeas corpus* case of this kind to pass on the credibility of those witnesses (i.e., those for Channell)" R. 8.

He further stated that:

> "My jurisdiction only extends to determining whether or not there is *any* credible testimony offered on behalf of the State or whether the testimony offered by Channell is overwhelming." R. 9.

Such cannot be the rule, because even under the lower Court's test, the State would only have to produce some (*any*) credible *testimony no matter how much was produced* by the petitioner.

Suppose Judge Manley himself had seen and talked to Channell on November 30, 1952 and December 1, 1952? Would he still remand Channell since the Demanding State offered *one* credible witness to testify that Channell was in California on November 30, 1952 and December 1, 1952? Does Channell have to produce 100 witnesses to testify that he was in Baltimore on such dates? *Even then,* the lower Court would have remanded Channell under the rule enunciated by it, because the existence of *any* credible testimony, under the lower Court's test, would have required remission.

The notion of the lower Court cannot be the law an-

nounced by this Court (or that in Maryland) because as this Court specifically justifies discharge where the evidence is *conclusive,* it is quite possible that there can be *some* credible testimony produced by the Demanding State and *still* the evidence produced by the petitioner could be overwhelming. *Such is the instant case.*

The evidence produced by Murphy (the State) consisted of only *one* witness and a handwriting expert. As to the handwriting man, he simply testified that the signature of one "Robert W. Kirk" on a hotel register card in Los Angeles from November 5, 1952, to November 18, 1952 and from November 27, 1952 to December 2, 1952, was the writing of Channell. As opposed to this, Channell produced a handwriting expert who testified that the alleged writing of Kirk (who was never produced) was not, and could not have been, the writing of Channell. *Furthermore, the lower Court apparently did not regard this handwriting "evidence" as very persuasive because he flatly stated that:*

> "I frankly state that if Mrs. Newman had not come here from California, I would not hesitate to say that the testimony offered on behalf of Channell was overwhelming and I certainly would release him; that is to say, I would accept that testimony as opposed to the handwriting experts." R. 8.

Therefore, the only testimony upon which the lower Court remanded Channell was that of *one* witness. She did identify Channell as being in her home on December 1, 1952, but her testimony on this point is obviously without merit. She said that she went into her bedroom at about 1:30 P .M. on December 1, 1952 and that it was a "nasty-rainy" day—that the sun was not out. She said that she saw a shadow in her dressing room, which was just beyond her bedroom. She saw a "shadow of a man" bending over the middle drawer of her dressing table. That she saw a man about five maybe

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four feet from her whom she identified as Channell. That there were no lights in her bedroom, dressing room or bathroom. That she spoke to him and he spoke to her. That he did not wear gloves or any mask. That she noticed a black 1952 Cadillac parked at the end of the driveway at the front of her house. That this was the only time she had ever seen this man and that he was in her sight for about a few seconds. That she identified a photograph of Channell shown to her by the Los Angeles police about two weeks after December 1, 1952. That she was shown maybe five or six other photographs on said date. That the man had his hands in the top drawer of her dressing table when she saw him and she told this to the police fifteen minutes later, but they took no fingerprints. That she told the police that she had not opened said drawer. That she noticed a gold "V" on the rear of the 1952 Cadillac, but did not notice the license number nor the State marking. That she wears glasses when she does fine handwork and that within four weeks of the hearing before Judge Manley she had been to an eye doctor. (R. 61)

This is the testimony on which the lower Court admittedly remands Channell. This is the "credible" witness that turns this case into one where her testimony as balanced against that of eight other persons makes the evidence "merely contradictory." The "credible" witness emphatically saw the *shadow* of a man when there was *no* light, either *natural or artificial* (this according to her own testimony). This credible witness testified that she is positive Channell was the man even though she only saw him for a few seconds and, of the witnesses produced by Channell, the lower Court said: ". . . some of the witnesses I am acquainted with and have great respect for their integrity." R. 7. Among them some knew Channell for many *years* and positively identified him as being in Baltimore on the

very date when he was allegedly seen by the one witness produced by Murphy.

If, as the one witness produced by Murphy testified, she told the police that he had his hands on everything, why did not the police take fingerprints? Perhaps because the law says that where other fingerprints are found on the scene of a crime and others have access to same, such evidence will not support a conviction, 63 A. L. R. 1324. Even *she* thought that was strange!

Why would a "master burglar" go into her house in the daytime, wearing no gloves or mask and park his car on *her* driveway? Why was she not able to identify the identity of the State which had registered said car? This "master burglar" even gave her the opportunity to hear his voice and he conveniently spoke to her. And although she admits *nothing was taken from her home,* she travels 3000 miles across the United States to identify Channell.

The issue in this case is, of course, whether Channell fled from justice from the Demanding State.

If he was not in the Demanding State, at the time of the commission of the alleged crime, then he obviously could not have fled from justice. Thus a federal constitutional question is presented. Great care should be exercised in determining this important matter, and if Channell was not in the Demanding State at the aforesaid time, he should be released. *Jones* v. *Leonard,* 50 Ia. 106; *Ex Parte Mohr,* 73 Ala. 503: Bailey, *Habeas Corpus,* Vol. I, Sec. 129 (1913).

The Governor, in an extradition hearing, exercises *judicial* functions and powers, *Willen* v. *Sheriff,* — Md. —, 95 A. 2d 87 (1953); *People* v. *Donohue,* 84 N. Y. 438, 441, and this is the obvious reason why the General Assembly of Maryland provided for an appeal from the decision of a lower Maryland Court in an extradition *habeas corpus* proceeding. For this is not the type of *habeas corpus* case in which an inmate from a penal institution complains that

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he was deprived of some right; this involves the transfer of a Maryland resident 3000 miles across this Continent, and hence, the General Assembly made specific provision for the entire procedure governing such a matter, from the arrest to the final appellate decision of the Maryland Court of Appeals.

If the Maryland Court of Appeals then, does have appellate jurisdiction relative to a judicial matter, it should review the judicial action of the lower Court. Certainly the lower Court exercised a judicial function and therefore why would it not have passed on the credibility of the witnesses below? If the lower Court has passed upon credibility—*only as concerns presence in the Demanding State at the time of the alleged crime*,—the result would have been completely different, because *the lower Court obviously believed the witnesses produced* by Channell.

Thus, he says:

> "It is unfortunate that I do not have the right, because I have certain ideas of my own which it is unnecessary for me to state regarding the effect that should be given that (Channell's) testimony. The witnesses here who have testified knew Channell, they were familiar with him, they were acquainted with him; and they would have a better opportunity to recognize him than some person who only saw him on one occasion." R. 8.

The above language clearly indicates that the lower Court would have released Channell had he felt himself free to pass on the credibility of the witnesses before him (only as to the question of presence within the Demanding State—and not on the question of guilt or innocence) and it is urgently submitted that he unnecessarily tied his *own* hands. If he were not allowed to pass on credibility, why does the General Assembly speak about the right of *habeas corpus* in the first place? If a lower Court has *no* right to

pass upon credibility, then of what value is the writ of *habeas corpus?* It is certainly a *judicial* writ. If the General Assembly gives the *right,* why does the lower Court feel that he cannot exercise one of the fundamental powers involved in a determination of the question passed by the writ, namely, a judicial inquiry into the credibility of witnesses testifying before him?

Honorable William Pinkney Whyte,[12] when Attorney General of Maryland certainly exercised a judicial function in passing on credibility when he considered the extradition of Max Juhn on July 29, 1890, Baltimore Daily News, July 30, 1890—Moore, *Extradition,* Vol. 2, Sec. 585, at p. 944 (1891). He refused to allow extradition of Juhn to New York on charges of false pretences, because he stated that a check signed by Juhn on the date of the alleged crime, showed that Juhn was not in New York on that date. Juhn was charged with falsely representing his financial condition to a New York merchant and thereby obtaining certain goods on the strength of said representation. The evidence of the check was the only evidence in favor of Juhn as opposed to the sworn affidavit of the New York merchant. Baltimore Sun, August 30, 1890—See opinions of Attorney General, February 29, 1952 (Maryland).

The lower Court in instant case, even made an important *mistake of fact* regarding the crucial issues involved herein. He thought that only *one* witness saw Channell in Baltimore on December 1, 1952 (i.e., Robert Murphy) (R. —) whereas in point of fact, three *others* saw him on that date and so testified. (Witnesses Armando Porter, Michael A. Vittello and Mary Askew.)

Thus, there was clear, convincing evidence that he was in the Asylum State on the very date when he was supposed

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[12] Later Governor of Maryland and United States Senator from Maryland.

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to have been in the Demanding State and yet the Judge apparently overlooked this. This might explain why he felt that he had no right to pass on credibility. There is quite a vital difference between reliable witnesses having seen Channell on the date of the commission of the alleged crime and on *some other date*, particularly when the sole issue is one of flight from justice on November 30, 1952 and December 1, 1952.

If, then the Maryland Court of Appeals has decided that the matter is a judicial one, *cf. Willen* v. *Sheriff*, *supra; Moore* v. *Sheriff*, — Md. —, 95 A 2d 87 (1953), then the aforesaid error of the lower Court should also be considered as another reason why an appeal should have been granted.

In fact, some authorities have decided that the question of presence in the Asylum State is a jurisdictional fact which should be determined in the same manner as any other fact and according to the common law rule with regard to preponderance of evidence. *People ex rel. Genna* v. *McLaughlin*, 145 App. Div. 513, 130 N.Y. Supp. 458 (2d Dept. 1911).

Of course, we abide by the test announced by the Maryland Court of Appeals in the *Zack* and *Audler* cases, *supra*. In *the Zack* case, the Maryland Court quoted from the opinion of *Illinois ex rel. McNichols* v. *Pease*, *supra*, and the test announced is one of "clear and satisfactory evidence. The Court will not discharge when there is merely "contradictory" evidence, *Munsey* v. *Clough*, *supra* although where the petitioner shows his presence in the Asylum State by "clear and satisfactory" evidence, he will be discharged *South Carolina* v. *Bailey*, *supra*.

We freely admit that neither the Maryland Court of Appeals nor the lower Maryland Court had power to pass on the question of alibi. However, there is a crucial dif-

ference between alibi evidence and evidence showing that an accused was not in the Demanding State at the time of the commission of the alleged crime!

> "While proof of absence from the Demanding State at time of the commission of the offence necessarily involves the facts which would constitute an alibi, there is an *obvious distinction* (emphasis supplied) between proof of absence from the State for the purpose of negativing the condition of extradition, that one is a fugitive from justice and proof of an alibi as such for the purpose of establishing one's innocence."
>
> 51 A.L.R. 792, *"Right to prove absence from Demanding State or alibi on habeas corpus in Extradition proceeding"* (1927)

We think that the presumption of validity and the *prima facie* sufficiency of the instant warrant has been clearly and convincingly overcome. *People ex rel Higgins* v. *Millspaw,* 281 N.Y. 441, 24 N.E. 2d, 117 rev'g 257 App. Div. 40, 12 N.Y.S. 2d 435 (1938); *Hyatt* v. *New York* 188, U.S. 691, 47 L. Ed. 657, 23 S. Ct. 456, 12 A. Crim. Rep. 311 (1903); *In Re Shoemaker,* 25 Cal. App. 551, 144 P. 985 (1914); *Ex Parte La Mantia,* 206 F. 330 D. C. (1913); *Ex Parte Spencer,* 34 Nev. 240, 11 P. 1 (1916). There was only one witness to testify that Channell was in the Demanding State and her testimony is glaringly defective (see pp. 19-20 herein). The lower Court itself was obviously *clearly satisfied* as to the evidence offered on behalf of Channell as opposed to that of the one witness (see p. 21 herein); but he felt duty bound to shut his judicial eyes to her credibility as opposed to the others, even though he had "the highest regard and greatest respect . . ." for some of them, (i.e., witnesses for Channell).

The case of *South Carolina* v. *Bailey, supra,* is probably the closest, in point of fact, to instant case and in the

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Bailey case, 20 witnesses testified that the petitioner was in the Asylum State, but 12 witnesses testified that he was in the Demanding State, on the crucial date. It is certainly easy to see why this Court felt that such evidence was contradictory and not overwhelming. Furthermore, there was testimony that the criminal was shot, *in the Demanding State* and that doctors had found bullet holes in the body of the *petitioner*. The ratio is 12 against 20 plus the physical evidence that petitioner had been shot.

How different that is from instant case: Here there is no 20-12 ratio, but rather 8 to 1. Nor is there such persuasive physical evidence such as the doctors testimony. The handwriting testimony was conflicting and ill thought of by the Maryland lower Court and so the only thing that makes the evidence "contradictory" is the lone testimony of Mrs. Newman.

It is obvious that such testimony is open to grave doubts. How easy it is for such a witness to "frame" a person. What was the motive of Mrs. Newman in travelling 3000 miles to identify Channell when absolutely nothing was taken from her house? Even if her testimony were air-tight (which it emphatically is *not*) does not the testimony of the eight other witnesses overcome her testimony? If one witness will suffice to produce a legal situation resulting in "contradictory" evidence, how easy it then becomes to extradite a person in *any* State.

It is respectfully submitted that under the decisions of this Court, the Maryland Court of last resort and the dictionary definitions of "overwhelming," and "clear and satisfactory" the evidence *was* overwhelming that Channell was in the Asylum State at the time of the alleged commission of the alleged crimes.

Conclusion

For the reasons stated, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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